CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

CORINNE R. HENSLEY Petitioner, v. SNOHOMISH COUNTY, Respondent, MALTBY CHRISTIAN ASSEMBLY, Intervenor.	**Consolidated** **Case No. 01-3-0004c** ***(Maltby UGA Remand)*** **ORDER ON REMAND AND RECONSIDERATION (*Maltby UGA Remand*)** **[Snohomish County Superior Court Remand of *Maltby Christian Assembly v. CPSGMHB, Corrine Hensley and Snohomish County,* No. 1-2-07907-5 and CPSGMHB Case No. 01-3-0004c, *Hensley v. Snohomish County* (*Hensley IV*)]**

I. CASE SYNOPSIS

In August of 2001 the Board issued a Final Decision and Order finding that Snohomish County's expansion of an Urban Growth Area did not comply with the requirements of the GMA and the Board invalidated the action. The UGA expansion was not done in accordance with the GMA and the County's own policies. Following issuance of the Board's decision, Maltby Christian Assembly filed a motion to intervene for purposes of reconsideration. The Board denied this motion, but granted intervention status for the compliance phase of the proceeding. The Board's denial was challenged in Superior Court and was remanded to the Board for reconsideration proceedings. The Board established a briefing schedule and conducted the reconsideration hearing.

After considering the written and oral arguments presented on reconsideration the Board finds that Petitioner had standing to pursue the challenge to the Maltby UGA expansion and further, the Board **upholds** and **affirms** the finding of noncompliance and determination of invalidity. The matter is remanded to the County with a new compliance schedule.

II. PROCEDURAL HISTORY

A. Prior Board Proceedings

The Central Puget Sound Growth Management Hearings Board (the **Board**) issued its "Final Decision and Order" (**FDO**) in CPSGMHB Case No. 01-3-0004c (***Hensley IV***)[1] on August 15, 2001. The FDO found the County's actions relating to the Clearview LAMIRD and Maltby UGA noncompliant with the GMA. The Board also determined that the County's designation of the Maltby UGA was invalid. The FDO established a compliance date and a date for the County to file a Statement of Actions Taken to Comply with the GMA and FDO. No compliance hearing was set in the FDO.

On September 4, 2001, the Board issued "Order on Intervention [Maltby Christian Assembly]." The Intervention Order **denied** Maltby Christian Assembly's request to intervene for purposes of seeking reconsideration of the FDO, but **granted** intervention status for the compliance proceeding.

On September 14, 2001, the Board was notified that the Maltby Christian Assembly had filed a Petition for Judicial Review in Snohomish County Superior Court challenging the Board's FDO.

On November 13, 2001, the Board issued "Order Staying Compliance Schedule Re: Maltby UGA [Pursuant to Order Granting Motion for Stay, Snohomish County Superior Court - Cause No. 01-2-07907-5].

B. Superior Court Proceedings

On October 24, 2001 Snohomish County Superior Court issued an "Order Granting Motion for Stay" in *Maltby Christian Assembly v. Central Puget Sound Growth Management Hearings Board; Corrine Hensley and Snohomish County,* Cause No. 01-2-07907-5.

On June 17, 2002, Snohomish Superior Court Judge James H. Allendoerfer issued a "Final Order on APA Petition" (**Superior Court Order**). The Superior Court Order states, " I hold that the failure to notify the church *in advance* of Ms. Hensley's Growth Management Hearings Board appeal was a denial of due process, and *requires an immediate remand to the Board for a de novo proceeding on the merits of said appeal*." Superior Court Order, at 5, (emphasis supplied).

[1] See: *Corrine R. Hensley and Jody L. McVittie v. Snohomish County [Roger Olsen – Intervenor]* (***Hensley IV)***, CPSGMHB Case No. 01-3-0004c, Final Decision and Order, (Aug. 15, 2001).

C. Board Proceedings on Remand and Reconsideration

On September 18, 2002, the Board issued a "Notice of Pre-remand Hearing Conference Re: Maltby UGA" (**PRHC**) scheduling a conference on October 7, 2002.

On October 7, 2002, the Board conducted the PRHC. Board Members Edward G. McGuire, Presiding Officer (**PO**) and Lois H. North attended the PRHC for the Board. Dick Stevens represented Intervenor Maltby Christian Assembly, Andrew Lane represented Respondent Snohomish County, and Petitioner Corinne Hensley appeared *pro se*.

Following discussions at the PRHC, the Board issued a "Notice of Continuance of Pre-remand Hearing Conference Re: Maltby UGA." The PRHC was continued until October 31, 2002.

On October 31, 2002, the Board convened the continued PRHC. On the same day the Board issued a "Pre-Remand Hearing Order in Superior Court Remand [No. 1-2-07907-5] and Board Reconsideration in Hensley IV (Maltby UGA Remand) CPSGMHB Case No. 01-3-0004c." This Board Order established the briefing schedule and hearing date. It also established the Legal Issues to be decided by the Board as follows: 1) Petitioner Hensley's standing; 2) Reconsideration of Legal Issues 5 and 6, as set forth and discussed in the August 15, 2001 FDO, at 28-34; and 3) the Board's determination of invalidity regarding the Maltby UGA, FDO, at 34-35.

On November 15, 2002, the Board received "Intervenor Maltby Christian Assembly's Motion for Reconsideration" (**MCA PHB**), with 11 attached exhibits; and Snohomish County's "Remand Hearing Brief," (**County PHB**), with six attached exhibits.

On November 25, 2002, the Board received "Petitioner Response to Respondents & Intervenors Motion for Reconsideration on Remand" (**Hensley Response**), with ten exhibits.

On December 2, 2002, the Board received "Intervenor Maltby Christian Assembly's Reply in Support of Motion for Reconsideration" (**MCA Reply**) and Snohomish County's "Remand Reply Brief re: Dispositive Motion to Dismiss for Lack of Standing" (**County Reply**).[2] The County Reply included and attached a "Declaration of Sheila McCallister" (**Declaration**).

On December 3, 2002, the Board conducted the Remand and Reconsideration Hearing (**RRH**) at the Board's offices. Present for the Board were Edward G. McGuire, presiding

[2] In a reconsideration situation, the moving party offers argument to support the motion and the non-moving party is given the opportunity to answer. Here, all the parties agreed, with the concurrence of the Board, that Intervenor and County would offer opening briefs, Petitioner would respond and the County and Intervenor would have the option to reply.

officer, and Board Members Lois H. North and Joseph W. Tovar. Richard M. Stephens represented Intervenor Maltby Christian Assembly; Brent D. Lloyd and Courtney Flora represented Snohomish County, and Corrine R. Hensley appeared *pro se*. Scott Kindle of Mills & Lessard, Inc provided Court Reporting services. The hearing commenced at 10:00 a.m. and ended at approximately 12:00 p.m.

D. Post Remand and Reconsideration Hearing Submittals

At the RRH, the Board requested copies of the two tapes covering the oral testimony provided by Ms. Hensley. The Board received copies of the two tapes on December 9, 2002. Additionally, Board Member Tovar requested that the County provide the Board with a summary of its experience with enforcement of concomitant agreements. On December 18, 2002, the Board received a letter regarding "Supplemental Information Concerning the Use of Concomitant Agreements in Snohomish County" and an attached "Declaration of Tom Barnett."

E. Preliminary Matters – Supplementation of the Record

In her response brief, Petitioner Hensley asked the Board to supplement the record with several documents. Hensley Response, at 10, 14 and 16 (footnotes 10, 12 and 13). The documents included: 1) a staff memo regarding "reasonable measures;" 2) permit tracking reports; and 3) letter from MCA to the County regarding the 2003 docket. Hensley Response, attached Exhibits 5, 7 and 8 to Hensley Response. Intervenor objected to including the permit tracking reports. MCA Reply, at 4. At the RRH, MCA renewed their objection to Exhibit 7 and the County objected to including all three exhibits. The Summary Table below reflects the Board's oral ruling.

Proposed Exhibit: Documents	**Ruling**
1. Staff memo to planning commissioners dated 9/19/02 [attached Ex. 5].	**Admitted –** RRH Ex. 1
2. Permit tracking reports [attached Ex. 7].	**Denied**
3. MCA letter to County dated 7/31/02 [attached Ex. 8].	**Admitted –** RRH Ex. 2
4. Hearing Examiner decision dated 9/27/02 regarding MCA conditional use permit.[3]	**Board takes notice –** RRH Ex. 3

[3] Petitioner Hensley provided this document to the presiding officer at the October 7, 2002 pre-remand hearing conference. No party objected. The Board's October 7, 2002 "Notice of Continuance of Pre-Remand and Hearing Conference Re: Maltby UGA" indicated the Board would take official notice of the September 27, 2002 Report and Decision of the Snohomish County Hearing Examiner – File No. 00 101117. 10/7/02 Notice, at 2 and footnote 1. The conditional use permit approves a structure of approximately 24,000 square feet and parking for approximately 300 vehicles. RRH Ex. 3.

III. ISSUES ON REMAND AND RECONSIDERATION

A. Petitioner Hensley's Standing

RCW 36.70A.280(2) governs the standing requirements for appearing before the Boards, it provides, in relevant part:

> A petition may be filed only by: . . . (b) *a person who has participated orally or in writing before the county* or city *regarding the matter on which a review is being requested.*

(Emphasis supplied).

Neither Intervenor nor the County disputes the fact that Corinne Hensley provided written testimony, on behalf of the "Little Bear Creek Protective Association" (**LBCPA**), to the County opposing the Maltby UGA expansion. Instead, MCA and the County contend that the written testimony provided in a December 4, 2000 letter [Exhibit 23] was only on behalf of LBCPA, not on Ms. Hensley's own behalf. Therefore, Intervenor and the County reason, that although the LBCPA could have had standing to appear before the Board,[4] Ms. Hensley did not have standing regarding the Maltby UGA expansion. MCA PHB, at 2-8; and County PHB, at 2-3.

Interestingly, neither MCA nor the County cite to any authority for the proposition that where an association or organization has standing, its individual members do not. The general rule [*i.e.* an organization has standing if one of its members has standing as an individual.] *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 830, 965 P.2d 636 (1998)] is the converse of the argument presented here.

It is undisputed that at the time the December 4, 2000 letter objecting to the Maltby UGA expansion was submitted to the County, Corinne Hensley was a member, and president, of the LBCPA. As such, the Board concludes that Ms. Hensley, as an *individual*, and member and officer of LBCPA, shared in the views of LBCPA. The signed and written testimony was sufficient, under the standing requirements of the GMA [RCW 36.70A.280(2)], to establish standing not only for LBCPA, but also for herself. Ms. Hensley clearly participated in writing before the County [Ex. 23] on the matter for which review was requested [the Maltby UGA expansion].[5] The testimony Ms. Hensley provided to the County Council on December 6, 2002 "on behalf of herself," regarding the Clearview LAMIRD merely indicates the views presented were Ms. Hensley's and she was not also representing them as those of LBCPA. Tapes and Transcript of 12/6/02 Council Hearing, Ex. 1 to MCA PHB. Therefore, the Board concludes that Ms. Hensley

[4] Little Bear Creek Protective Association was not named as a Petitioner in the Hensley PFR, CPSGMHB Case No. 01-3-0004c.
[5] *See*: Ex. 23.

had standing to proceed with her petition for review as it related to the Maltby UGA expansion. The motion to dismiss filed by Intervenor MCA and the County is **denied**.

B. Reconsideration of Legal Issues 5 and 6 from the FDO[6]

The two Maltby UGA Reconsideration issues are as follows:

5. *Did the County fail to comply with the requirements of RCW 36.70A.120, which requires planning activities and capital budget decisions to be made consistently with the comprehensive plan, when it adopted the Maltby amendments?*

6. *Did the County fail to comply with the County-wide Planning Policy consistency requirements of RCW 36.70A.210 (CPPs: UG-14), the internal consistency requirements of RCW 36.70A.070(preamble) (Plan Policies: LU-1.A.9) and the requirements of RCW 36.70A.215, when it adopted the Maltby amendments?*[7]

In the FDO these two Legal Issues were discussed and decided together, likewise, they will be discussed together here.

The Board has reviewed and considered the written and oral arguments offered on reconsideration presented by both MCA and the County, and is not persuaded that it erred in the August 15, 2001 FDO regarding the Maltby UGA expansion issue. *See*: MCA PHB, at 8-22; and County PHB, at 3-14.

The Board does not have jurisdiction to review the County's actions for compliance with the Constitutions of the United States of America or the State of Washington, nor for compliance with the federal Religious Land-Use and Institutionalized Persons Act.

Additionally, the amendment to LU 1.A.9, the amendment to the Future Land Use Map (**FLUM**) expanding the UGA, and the amended Plan designation and rezoning to commercial, occurred at the same time in the two challenged Ordinances. These amendments were made as a comprehensive package, they became effective together and none preceded another.

Further, the expansion of the Maltby UGA on the FLUM and commercial Plan designation and rezoning created an internal inconsistency between the Plan Policy and the FLUM [RCW 36.70A.070(preamble)], and an inconsistency between the FLUM

[6] *See*: *Hensley v. Snohomish County* (***Hensley IV***), CPSGMHB Case No. 01-3-0004c, Final Decision and Order, (Aug. 15, 201), at 28-34.

[7] Petitioner Hensley abandoned here challenge on numerous CPPs and Plan Policies in her prehearing brief. The issue statement presented here only reflects the CPP and Plan Policy argued in briefing and is the only issue the Board addressed in the Maltby UGA discussion in the FDO.

(within the Plan) and the CPP [RCW 36.70A.210]. Finally, in undertaking these actions the County did not perform its planning activities in conformity with its comprehensive plan [RCW 36.70A.120]. Therefore, the Board **upholds** and **affirms** the August 15, 2001 FDO, including Board Member Tovar's Concurring Opinion. *See*: Appendix A.

The Board also concurs with the conclusion and reasoning offered by Judge Allendoerfer[8] in his June 17, 2002 "Final Order on APA Petition," regarding concomitant agreements.

> I find that the use of concomitant agreements violates the Growth Management Act, and sound principles of long-range land use planning. Legislative determinations of area-wide significance, such as changing UGA boundaries, cannot be so limited in vision and scope that they become a mere negotiation process with landowners over how the structures proposed for their property will be occupied some day. The Growth Management Act concept requiring density studies and buildable land surveys before authorizing expansion of UGAs into rural areas is a responsibility of the County which cannot be contracted away to a church, or to any other quasi-public or institutional entity which wants commercial property but contends that it is different in an occupancy sense from traditional commercial use.
>
> The time to use concomitant agreements, and to bind a property owner to a particular use such as a church, is not at the legislative stage where policy level decisions under the GMA are being made, but at the development stage where zoning designations, site plans and building designs are being made. That's the stage where a concomitant agreement would be considered an enlightened and innovative method of regulatory control.
>
> I conclude that the County confused these concepts in the instant case and improperly used a concomitant agreement, which is a quasi-judicial tool, in a legislative context, resulting in a disregard of the Growth Management Act requirement that UGAs not be expanded into rural areas under any circumstance without first conducting a buildable land survey and evaluation. I would therefore, if asked, affirm the decision of the Growth Management Hearings Board in this case.

[8] The Board recognizes that the quoted portion of Judge Allendoerfer's Order is dicta. The Superior Court Order provides: "In the interest of addressing that problem [the remand to the Board imposes unfortunate and frustrating delay for all the parties], and perhaps shortening up the process of reaching resolution of this case, I'm going to engage in some dicta at this time, and address the remaining issues in a non-binding informal way." Superior Court Order, at 5-6.

Superior Court Order, at 10-11. The Board augments and supplements the August 15, 2001 FDO with the above noted language from Judge Allendoerfer's Order.

C. Invalidity

In the August 15, 2002 FDO, the Board concluded:

> Maltby UGA:
>
> The Board has found the designation of the Maltby UGA, FLUM designation and rezoning to be **noncompliant** with RCW 36.70A.120, 070(preamble) and .210. In adopting the Maltby amendments, the County adopted changes to its regulations to implement these noncompliant designations. The County has attempted to expand and designate a UGA without complying with its own CPP and Plan Policy which would require compliance with RCW 36.70A.020(1). The County did not determine that adequate public facilities and services existed or could be provided in an efficient manner to the expanded Maltby UGA, therefore, the County's action substantially interfered with fulfillment of Goal 1. The Board enters a **determination of invalidity** for Ordinance Nos. 00-094 and 00-091, related to the Maltby UGA, FLUM designation and rezoning.

Hensley IV, FDO, at 35. On reconsideration, MCA argues that the County's decision complied with the Act and consequently there is no basis for invalidating the County's action. The Board disagrees. On reconsideration the Board continues to find that the County is noncompliant with the noted requirements and goal of the Act and **upholds** and **affirms** its **determination of invalidity** for Ordinance Nos. 00-91 and 00-94.

IV. ORDER

Based upon review of the Board's August 15, 2001 FDO, the Superior Court's Final Order on APA Petition, the Motions and supporting briefs and all materials submitted by the parties, the Act, Washington case law, and prior decisions of this Board and other Growth Management Hearings Boards, and after considering and deliberating on the arguments presented, the Board enters the following ORDER:

- The motions to dismiss Petitioner Hensley's petition for review, for lack of standing, filed by Intervenor Maltby Christian Assembly and Snohomish County are **denied**.

- The Board **upholds** and **affirms** the August 15, 2001 FDO. The Board also **augments** and **supplements** that FDO with the quoted portion of the Superior Court Order noted *supra*, at 6.

- The Board **upholds** and **affirms** its **determination of invalidity** in the August 15, 2002 FDO.

- On reconsideration, the Board continues to find and conclude that Snohomish County's adoption of Ordinance Nos. 00-091 and 00-094, as it applied to the expansion of the Maltby UGA, FLUM and Plan designation and rezoning, was **clearly erroneous** and **does not comply** with the consistency requirements of RCW 36.70A.210, .070(preamble) and .120. Further, the Board enters a continuing **determination of invalidity** on the adoption of these Ordinances, as they pertain to the Maltby UGA, FLUM and Plan designation and rezoning, since the County's action substantially interferes with the fulfillment of goal 1 (RCW 36.70A.020(1).

The Board therefore, remands Ordinance Nos. 00-091 and 00-094 to the County with the following directions:

1. By no later than **March 24, 2003**, the County shall take appropriate legislative action to repeal, amend or otherwise modify the Maltby UGA, FLUM designation and rezoning, as adopted in Ordinance Nos. 00-091 and 00-094, to comply with the consistency requirements of RCW 36.70A.210, .070(preamble) and .120.

2. By no later than **March 31, 2003**, the County shall file with the Board an original and four copies of a Statement of Action Taken to Comply (**SATC**) with the GMA, as set forth in this FDO. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on Petitioners Hensley and Intervenor Maltby Christian Assembly.

3. By no later than **April 3, 2003**, Petitioner and Intervenor may file with the Board an original and four copies of Comments on the County's SATC. Petitioner and Intervenor shall simultaneously serve copies of their Comments on the County's SATC on the County.

4. By no later than **April 10, 2003**, the County may file with the Board an original and four copies of the County's Reply to Comments. The County shall simultaneously serve a copy of such reply on Petitioner and Intervenor.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m**. on **April 14, 2003** at the Board's offices.

If the County takes legislative compliance actions prior to the deadline set forth in section 1 of this Order, it may file a motion with the Board requesting an adjustment to this

compliance schedule. Further, if the all the parties consent, the Board will consider conducting the compliance hearing telephonically.

So ORDERED this 19th day of December 2002.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____

Edward G. McGuire, AICP
Board Member

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Lois H. North
Board Member

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Joseph W. Tovar, AICP
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300. Pursuant to WAC 242-02-832(3), this Order is not subject to a motion for reconsideration.

APPENDIX A

The following excerpts are from the Board's August 15, 2001 FDO in *Hensley IV*. First, is the Board's discussion of the [1] Maltby UGA Issues – *Hensley IV,* FDO, at 28-34. Second, the Board's discussion of the [2] Invalidity Request for the Maltby UGA – *Hensley IV*, FDO, at 34-35. Third, the relevant provisions of the [3] Board's Order – *Hensley IV*, FDO, at 35-36. Fourth, [4] Board Member Tovar's Concurring Opinion – *Hensley IV*, FDO, at 38-39. Finally, the Board's relevant [5] Findings of Fact – *Hensley IV*, FDO, at 41-42.

[1] MALTBY UGA ISSUES

Abandoned Issues

Legal Issues, or portions of Legal Issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits. March 23, 2001 PHO, at 6-7.

Petitioner states, "Legal issues 1-5 will be briefed where appropriate in legal issue 6. If a reference or inference to these issues is not suggested, then please consider the [Legal Issue] abandoned. This is being done to simplify the issues and eliminate redundancy." Hensley PHB, at 57. The County asserts that Petitioner has in fact abandoned Legal Issues 1-5 in their entirety. Co. PHB, at 100. Generally, the Board agrees, but notes that the essence of Petitioner's challenge under Legal Issue 6 is that the County's action of adopting the Maltby UGA did not comply with its CPPs and Plan Policies, thus Legal Issue 5 has not been abandoned, it will be discussed along with Legal Issue 6. Pursuant to WAC 242-02-570 issues, or portions of issues not briefed are deemed **abandoned**. Therefore, Petitioner Hensley has **abandoned** Maltby UGA Legal Issues 1-4.

Legal Issues 5 and 6

The Board's PHO set forth Legal Issue Nos. 5 and 6, as follows:

7. ***Did the County fail to comply with the requirements of RCW 36.70A.120, which requires planning activities and capital budget decisions to be made consistently with the comprehensive plan, when it adopted the Maltby amendments?***

8. ***Did the County fail to comply with the County-wide Planning Policy consistency requirements of RCW 36.70A.210 (CPPs: UG-1, 8, and 14, OD-1, 5, 9, 10 and 11, TR-4, 5 and 8), the internal consistency requirements of RCW 36.70A.070(preamble) (Plan Policies: PE-2.C1, LU-1.A, LU-1.A.2 & A.9 & A.10, LU-1.B &B.2, LU-1.C.3, Objective LU-1.D [and policies], LU-2.B.1 & B.2, LU-2.C.2, LU-10.A.1, TR-1.A & A.3,***

TR-1.B.2 & B.3, TR-1.C.2 & C.4 & C.5, TR-4, TR-4.D.1 & D.2 & D.4 & D.6, TR-4.E.2 & E.4 & E.5, TR-5.A.4, TR-7 [including all Objective A and B and associated policies], TR-8.B, TR-8.C[and associated policies], TR-9.A.2, CF-1.A and A.1, CF-2, CF-10.B, UT-2.B.2, NE-1.B.1, NE-1.C.2, NE-3.C.2, NE-4.A [and associated policies], and NE-4.D [and associated policies]), and the requirements of RCW 36.70A.215, when it adopted the Maltby amendments? [3/21/01 submittal; Hensley PFR, at 3 – Maltby #6]

Abandoned Issues

Petitioner Hensley's briefing and argument is limited to challenging the Maltby UGA designation' compliance with RCW 36.70A.120, .210, .215 and consistency with CPP UG-14 and Plan Policy LU-1.A.9. Hensley PHB, at 56-66. The County agrees. Co. PHB, at 100. Hensley, Snohomish County and the Board are all in accord.

Pursuant to WAC 242-02-570 issues, or portions of issues not briefed are deemed abandoned. Therefore, Petitioner Hensley has **abandoned** the following portions of Maltby UGA Legal Issues 6: CPPs: UG-1, 8, OD-1, 5, 9, 10 and 11, TR-4, 5 and 8), the internal consistency requirements of RCW 36.70A.070(preamble) (Plan Policies: PE-2.C1, LU-1.A, LU-1.A.2 & A.10, LU-1.B &B.2, LU-1.C.3, Objective LU-1.D [and policies], LU-2.B.1 & B.2, LU-2.C.2, LU-10.A.1, TR-1.A & A.3, TR-1.B.2 & B.3, TR-1.C.2 & C.4 & C.5, TR-4, TR-4.D.1 & D.2 & D.4 & D.6, TR-4.E.2 & E.4 & E.5, TR-5.A.4, TR-7 [including all Objective A and B and associated policies], TR-8.B, TR-8.C[and associated policies], TR-9.A.2, CF-1.A and A.1, CF-2, CF-10.B, UT-2.B.2, NE-1.B.1, NE-1.C.2, NE-3.C.2, NE-4.A [and associated policies], and NE-4.D [and associated policies].

Applicable Law and Discussion

Petitioner Hensley's challenge to the designation of the Maltby UGA expansion is basically as follows. Pursuant to RCW 36.70A.215, the County adopted CPP UG –14 to govern UGA expansions; to maintain consistency with this UGA expansion CPP, the County adopted Plan policy LU 1.A.9. The CPP and Plan policy include review and analysis requirements for the expansion of UGAs for residential, commercial and industrial lands. The FLUM designation and rezone accompanying the Maltby UGA designation was for commercial lands. In making this UGA expansion and designations, the County did not comply with its requirements for UGA expansion as provided for in UG-14 and LU 1.A.9. The use of the area, or existence of a concomitant agreement, is meaningless in terms of compliance with these policies. The County has not followed its own policies. Hensley PHB, at 58-66, Hensley Reply, at 39-43.

The County does not dispute that it expanded the Maltby UGA, amended the FLUM and rezoned the area commercial, but essentially argues that the existence of a concomitant

agreement limiting the use of the area in dispute, limits the use of the property for use as a church. Since the land cannot be used for commercial purposes, the requirements of UG-14 and LU 1.A.9 are not applicable. Further, the County argues that the Board must accord deference to the County in interpreting its own CPPs. Co. PHB, at 106-117.

The relevant provisions of CPP UG-14, is subsection (d), which provides:

> Expansion of the Boundary of an Individual UGA: *Expansion of the boundary of an individual UGA to include additional* residential, *commercial* and industrial *land shall not be permitted unless it complies with the Growth Management Act, and one of the following four conditions are met:*
>
> 1. The expansion is the result of the five-year buildable lands review and evaluation required by RCW 36.70A.215.
> 2. The expansion is the result of the review of UGAs at least every ten years to accommodate the succeeding twenty years of projected growth, as required by RCW 36.70A.130(3).
> 3. All of the following conditions are met for expansion of the boundary of an individual UGA to include additional residential land [Three conditions are specified relating to population growth, land capacity analysis and reasonable measures to accommodate growth without expanding the UGA.]
> 4. Both of the following conditions are met for expansion of the boundary of an individual UGA to include additional commercial and industrial land:
>
>   a). The county and the city or cities within that UGA document that commercial or industrial land consumption within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of the remaining commercial or industrial land base, as documented in the Procedures Report required by UG-14(a), may also be considered as a basis for expansion of a boundary of an individual UGA to include additional commercial or industrial land; and

> b). The county and the city or cities within the UGA consider reasonable measures adopted as an appendix to the Countywide Planning Policies pursuant to UG-14(b) that could be taken to increase commercial or industrial land capacity inside the UGA without expanding the boundaries of the UGA.

Ex. 319, Countywide Planning Policies for Snohomish County, as amended by Ordinance No. 99-121, at 4-5, (emphasis supplied). The only section of this CPP that is disputed in this case is UG-14(d).[9] There is no ambiguity in UG-14(d) related to whether it applies to the expansion of a UGA that includes commercial land. The plain language of the CPP [and Plan Policy] governs. Simply put, *expansion of a UGA to include commercial land shall not be permitted unless certain conditions are met*. No interpretation is needed, by the Board or the County, to divine its application. The same clarity resonates in Plan Policy LU 1.A.9, which includes UG-14(d) in its entirety.[10] Therefore, the

[9] There is no dispute regarding the applicability of UG-14(d)(1-3), these provisions do not apply to the Maltby amendments.

[10] Plan Policy LU 1.A.9 provides:

> LU 1.A.9 - UGA boundaries shall be re-evaluated at least every five years to determine whether or not they are capable of meeting the county's 20-year population and employment projections. This re-evaluation shall be consistent with Snohomish County's "buildable lands" review and evaluation program requirements established in Countywide Planning Policy UG-14. **[The text of UG-14(d) begins here]** Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it complies with the Growth Management Act, and one of the following four conditions are met:
>
> 1. The expansion is the result of the five-year buildable lands review and evaluation required by RCW 36.70A.215.
> 2. The expansion is the result of the review of UGAs at least every ten years to accommodate the succeeding twenty years of projected growth, as required by RCW 36.70A.130(3).
> 3. All of the following conditions are met for expansion of the boundary of an individual UGA to include additional residential land [Three conditions are specified relating to population growth, land capacity analysis and reasonable measures to accommodate growth without expanding the UGA.]
> 4. Both of the following conditions are met for expansion of the boundary of an individual UGA to include additional commercial and industrial land:
>
>   a). The county and the city or cities within that UGA document that commercial or industrial land consumption within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of

question for the Board is what significance, if any, does the concomitant agreement have in relation to UG-14(d) and LU 1.A.9. Does it work to exempt or exclude this action from the provisions of UG-14 or LU 1.A.9?

The County explains that under the County's land use inventory system a church is a quasi-public/institutional use. However, neither the County's FLUM nor zoning code includes a "quasi-public/institutional" use category. Therefore, use of an existing FLUM and zoning category – commercial – is appropriate. However, the County contends, the designation on the FLUM and rezoning to "commercial" does not necessarily mean the land can be used for commercial purposes. To ensure that the property is not designated and zoned for commercial, then used for [commercial] purposes other than a church, the owner of the property signed and recorded a concomitant agreement.[11] Ex. 163. Therefore, the County reasons, since the concomitant agreement limits the use of the property for that of a church, and church related facilities, the property cannot be used for commercial purposes and UG-14(d) and LU 1.A.9 does not apply. Co. PHB, at 106-109.

In reply, Petitioner Hensley reiterates that the issue is not about individualized use of the property, but about the County's refusal to follow its own policies. Hensley Reply, at 39.

Although the Board understands the County's logic, it does not find the County in compliance with the GMA for the following reasons. First, the Board acknowledges concomitant agreements have a long history in this state and have been upheld by our Courts in the pre-GMA *zoning* context;[12] however, concomitant agreements do not readily transfer to the GMA context. GMA planning contains numerous requirements not found in pre-GMA planning. These requirements include, for example: ongoing and extensive public participation, designated and documented UGAs, state articulated goals provide guidance to plans and implementing regulations, required (not optional) comprehensive planning, plans must contain certain elements, plan elements must be consistent, and development regulations must be implemented consistently with the plans – through regulations (*i.e.* zoning) and capital investments. UGA expansion and

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> the remaining commercial or industrial land base, as documented in the Procedures Report required by UG-14(a), may also be considered as a basis for expansion of a boundary of an individual UGA to include additional commercial or industrial land; and
>
> b). The county and the city or cities within the UGA consider reasonable measures adopted as an appendix to the Countywide Planning Policies pursuant to UG-14(b) that could be taken to increase commercial or industrial land capacity inside the UGA without expanding the boundaries of the UGA.

Ex. 75, Ordinance No. 00-091, Exhibit A, at 2-3.

[11] The County also provides a brief history of concomitant agreements as a traditional zoning instrument and argues such agreements retain vitality in the GMA context.

[12] In the pre-GMA world, planning was optional, plans were advisory and there were not requirements in state law for: the designation of UGAs, state goals, mandated plan elements, consistency requirements and required implementation of plans.

amendment to a plan [FLUM] designation involves broader issues of public concern and interest than the use of an individual parcel of property. Concomitant "zoning" agreements for a parcel of property cannot be the controlling factor in issues of UGA expansion or comprehensive plan [FLUM] designation.

Second, the Board notes that churches are permitted in virtually all of the County's zoning designations as either outright or conditional uses. Ex. 1-HOM, Zoning Code Use Matrix, 18.32.040 SCC. Consequently, the ultimate use of the property could not have been the impetus for the expansion of the UGA, change in FLUM designation or rezoning.

Third, and related, the County acknowledges, "Prior to the action, this property was located on the edge of the urban growth boundary. It could have been permitted outside the urban growth boundary, but would not have had sewers available. The scale of the use is such that it is more appropriate in the urban area." Co. PHB, at 113; *see also*, Ex. 164.

Fourth, there is no language in UG-14 or LU 1.A.9 that indicates that "commercial land" means anything other than what is designated on the FLUM or Zoning maps. The concomitant agreement does not alter this fact. Therefore, the inescapable conclusion is that expanding the Maltby UGA to include the 13 acres as "urban commercial" is commercial land falling within the purview of UG-14(d) and LU 1.A.9. FOF 14-16.

The Board does not disagree with the County that this church use is more appropriate in the urban area, but the issue here is whether the UGA was expanded consistently with the County's own policies. The availability and adequacy of capital facilities, such as sewers, is a significant factor in the designation and/or expansion of UGAs and cannot be glossed over lightly. *See*: RCW 36.70A.215(2)(a) and .110(3) and (4). Since the availability of sewers was a determining factor in the expansion, not the ultimate use of the property, the Board finds that the rationale provided by the County for concluding that CPP UG-14(d) and LU 1.A.9, did not apply to the Maltby amendments was in error.

For the reasons stated above, the Board finds UG-14(d) and LU 1.A.9 are applicable to the County's expansion of the Maltby UGA and "urban commercial" designation on the FLUM and rezoning, as accomplished by the adoption of Ordinance Nos. 00-091 and 00-094. The County's adoption of the Maltby amendments in Ordinance Nos. 00-091 and 00-094 was **clearly erroneous** and **does not comply** with the consistency requirements of RCW 36.70A.210, 070(preamble) and .120.

Finally, the Board recognizes, as the County explains, it has not fully completed all aspects of its "buildable lands" process as required by RCW 36.70A.215. The County is correct, that full compliance with RCW 36.70A.215 is not required to be completed until September 1, 2002. However, portions of the County's "buildable lands" process have been completed, adopted and are effective, including the guiding principle of UG-14 –

"Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it complies with the [GMA] and one of the following four conditions are met." If the conditions have not yet been fully defined, by necessity, the prohibition on UGA expansion is operative until such time as they are established and applied.

Conclusions

The Board finds that the rationale provided by the County for determining that CPP UG-14(d) and LU 1.A.9, did not apply to the Maltby amendments and their subsequent adoption was **clearly erroneous**. UG-14(d) and LU 1.A.9 **are applicable** to the County's expansion of the Maltby UGA, "urban commercial" designation on the FLUM and rezoning, as set forth in Ordinance Nos. 00-091 and 00-094. The County's adoption of the Maltby amendments in Ordinance Nos. 00-091 and 00-094 **does not comply** with the consistency requirements of RCW 36.70A.210, 070(preamble) and .120. The Ordinances will be **remanded** and the County directed to take legislative action to comply with the requirements of the GMA.

Hensley IV, FDO, at 28-34.

[2] INVALIDITY REQUEST

Both Petitioners assert that the County's actions substantially interfere with the goals of the Act and urge the Board to enter a determination of invalidity. Hensley PHB, at 55 and 66; McVittie PHB, at 21.

RCW 36.70A.302 provides:

> (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
> (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit

> application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

The Board has found that the County's adoption of the Clearview LAMIRD and Clearview Plan Policies, in Ordinance No. 00-091, did not comply with the requirements of RCW 36.70A.070(5) and was not guided by the goals stated in RCW 36.70A.020(1), (2) and (3). Further, the Board has found that the County's adoption of the Maltby UGA, in Ordinance No. 00-094, did not comply with the requirements of RCW 36.70A.120 or .210. This Order will **remand** these Ordinances for remedial action by the County. Consequently, pursuant to RCW 36.70A.302, the Board now considers whether to enter a determination of invalidity on either or both of the actions embodied in these Ordinances.

. . .

Maltby UGA:

The Board has found the designation of the Maltby UGA, FLUM designation and rezoning to be **noncompliant** with RCW 36.70A.120, 070(preamble) and .210. In adopting the Maltby amendments, the County adopted changes to its regulations to implement these noncompliant designations. The County has attempted to expand and designate a UGA without complying with its own CPP and Plan Policy which would require compliance with RCW 36.70A.020(1). The County did not determine that adequate public facilities and services existed or could be provided in an efficient manner to the expanded Maltby UGA, therefore, the County's action substantially interfered with fulfillment of Goal 1. The Board enters a **determination of invalidity** for Ordinance Nos. 00-094 and 00-091, related to the Maltby UGA, FLUM designation and rezoning.

Hensley IV, FDO, at 34-35.

[3] ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

> . . . Snohomish County's adoption of Ordinance Nos. 00-091 and 00-094, as it applied to the expansion of the Maltby UGA, FLUM designation and rezoning, was **clearly erroneous** and **does not comply** with the consistency requirements of RCW 36.70A.210, .070(preamble) and .120, as set forth and interpreted in this FDO. Further, the Board enters a **determination of invalidity** on the adoption of these Ordinances, as they pertain to the Maltby UGA, FLUM designation and rezoning, since the

> County's action substantially interferes with the fulfillment of goal 1 (RCW 36.70A.020(1).

Hensley IV, FDO, at 35-36.

[4] Board Member Tovar's Concurring Opinion

I concur with my colleagues' rationale and the outcome regarding the expansion of the Maltby UGA. I write separately here to clarify why the County's reliance on a concomitant agreement in this specific instance was misplaced, particularly in view of the other alternatives apparently available to achieve the County's policy objectives. I also would like to voice a more general concern about reliance on concomitant agreements in the context of county legislative actions pursuant to the GMA, such as UGA expansions or rural land use designations.

Notwithstanding the fact that the Future Land Use Map designates the land in question as "urban commercial" (Finding of Fact 15) the County's legislative body here relies on a private agreement to effectively designate it "church use only." At the hearing on the merits, I asked about the process for revoking or extinguishing the concomitant, and queried whether such revocation would require notice, a hearing or provision for an appeal. The County pointed to none. Instead, it agreed with Hensley's assertion that the concomitant is something that the County could revoke at "any point in time," but seemed to suggest that it could achieve a similar result by simply amending its plan. Transcript at 100-101. This response reveals a fatal flaw in the County's approach. Unlike the revocation of a concomitant agreement, the revocation of the County's land use plan, whether on a wholesale or a partial basis, would be subject to the goals and requirements of the GMA, including notice pursuant to RCW 36.70A.035, public participation pursuant to RCW 36.70A.130/.140, and provisions for appeal pursuant to RCW 36.70A.280.

Stepping back and examining the County's policy objective (i.e., to expand the UGA for a very narrow range of permitted uses) it is clear that there are several GMA-compliant alternatives available to the County to achieve this end. For example, at the hearing on the merits, I asked the County if anything prohibited it from simply amending its future land use map and comprehensive plan to create a category (e.g., "public/institutional) to correspond to the designations in the land use inventory. The response was "no." Transcript, at 106. This would seem to be one, albeit not the only, way in which the County could respond.

Finally, I would sound two cautions to local governments concerning the use of "concomitant agreements" in the land use arena. First, the scope and nature of legislative actions under the GMA (e.g., adoption/amendment of comprehensive plans or development regulations) are fundamentally different from the scope and nature of development permits. Instruments such as concomitant agreements may still have utility

as applied to permits, however, as illustrated here, are problematic at best when applied to legislative GMA actions. Second, I would caution against reliance on applicability of the "conditional rezoning doctrine" to GMA legislative actions. All of the court cases cited by the County describing this doctrine were pre-GMA (i.e., pre-1990) cases. There is no post-1990 case law that attempts to apply or reconcile the "conditional rezoning doctrine" with the legislative component of the land use decision-making regime under the GMA.

Hensley IV, FDO, at 38-39.

[5] <u>Findings of Fact 14-16</u>

14. Ordinance No. 00-094 expands the Maltby UGA to include the 13 acres within the challenged area. Ex. 77, Ordinance No. 00-094, Section 3, Exs. A and B.

15. Ordinance No. 00-094 redesignates the expanded Maltby UGA area from Rural Residential and Rural/Urban Transitional Area to "**Urban Commercial**". Ex. 77, Ord. No. 00-094, Section 4, Exs. A and B. The Board notes that Ex. B to this Ordinance indicates a "PCB [Planned Community Business] designation, per SCC 18.12.030.

16. Ordinance No. 00-091 amends the County's FLUM to change the 13 acres within the challenged Maltby area from Rural Residential and Rural/Urban Transitional Area to "**Urban Commercial**." Ex. 75, Ordinance No. 00-091, Section 2 and Ex. B-1.

Hensley IV, FDO, at 41-42.